

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and
Respondent,

v.

JACQUELINE WONG,

Defendant and
Appellant.

B290127

(Los Angeles County
Super. Ct. No. SA092855-01)

APPEAL from a judgment of the Superior Court of Los Angeles County, Kathryn A. Solorzano, Judge.
Conditionally reversed and remanded.

Lynette Gladd Moore, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle, Supervising Deputy Attorney General, Colleen M. Tiedemann, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

The jury found defendant and appellant Jacqueline Wong guilty of stalking (Pen. Code, § 646.9, subd. (a) [count 5]),¹ stalking in violation of a court order (§ 646.9, subd. (b) [count 6]), and violating a protective order (§ 166, subd. (a)(4) [count 7]). She was acquitted of vandalism (§ 594, subd. (a) [count 1]) and assault with a deadly weapon (§ 245, subd. (a)(1) [count 2]). A charge of elder abuse (§ 368, subd. (b)(1) [count 4]) was dismissed.² Wong was sentenced to five years of formal probation and ordered to serve 292 days in county jail.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

² The information charged criminal threats in count 3 (§ 422, subd. (a)). The amended information omitted the count.

On appeal, Wong argues that there was insufficient evidence to support her conviction for stalking in violation of a court order in count 6. In supplemental briefing, she argues that her conviction must be conditionally reversed because she is entitled to an eligibility hearing under recently enacted section 1001.36, which gives trial courts discretion to grant pretrial diversion for mental health treatment to qualified defendants. The Attorney General argues that conditional reversal is inappropriate because section 1001.36 does not apply retroactively.

We conclude substantial evidence supports the jury's guilty verdict in count 6. However, we conditionally reverse Wong's conviction and remand for the trial court to determine whether to exercise its discretion to grant pretrial mental health diversion pursuant to section 1001.36, including whether to conduct a hearing to determine Wong's eligibility.

FACTS AND PROCEDURAL HISTORY

In November 2013, Wong lived in a condominium complex in unit 109. The victim, M.S., and his girlfriend, E.L., resided in unit 209 of the same complex, which was located directly above Wong's unit.

Beginning in October 2015, and continuing until she moved out of the complex in April 2017, Wong engaged in a pattern of hostile conduct toward M.S. and E.L., which gave rise to the instant criminal proceedings. The stalking charge

arose from a series of incidents that took place between December 7, 2015, and June 14, 2016, prior to imposition of a protective order on August 10, 2016. The charge of stalking in violation of a court order arose from incidents occurring between September 26, 2016, and April 24, 2017, after the protective order had been imposed. Although Wong challenges only the sufficiency of the evidence in support of her conviction of stalking in violation of a court order in count 6, we include the facts that gave rise to her conviction of stalking in count 5, which inform our conclusion that her actions following imposition of the protective order constituted an implied threat.

Stalking (Count 5)

M.S. and E.L. had an assigned parking spot next to Wong in the parking lot of the condominium complex. On October 28, 2015, Wong accused the couple of scratching her car and sent them an estimate for the cost of repairs. E.L. responded with a letter denying that they caused the scratches. M.S. reported the incident to the condominium's homeowner association.

Immediately thereafter, Wong began playing loud music throughout the day. M.S. testified that there was "a lot of very large loud music being played downstairs in [Wong's] condo starting at anywhere from 4:30 to 5:30 in the morning and continuing till 11:00 or 12:00 o'clock at night even when she wasn't there." The music was played

“[s]poradically. Not the whole day.” However, this happened “[a]lmost daily.”

E.L. testified that the music got incrementally louder over time, and that Wong would leave the music playing all day. A clock radio would go off at 5:00 a.m., and it would stay on for an hour. At 6:00 a.m., a recording of a phone ringing would play for an hour. Then music would start playing and would stay on all day, even if Wong wasn’t home.

On December 7, 2015, the music was still playing at 11:00 p.m., so E.L. called the police to complain. The police arrived at around midnight, and the music stopped. The next morning there was a scratch on E.L.’s car.

In January 2016, Wong posted signs within the condominium complex reading: “209 pervert, asshole.” At first, she posted them outside of her condominium, but later she moved them to her patio, which was visible from M.S. and E.L.’s kitchen window. At around the same time, Wong placed a cardboard box on her patio, which had similar writing scrawled on it. These signs “were there constantly.”

At the end of January 2016, E.L. noticed more scratches on her car. On February 8, 2016, E.L. noticed additional scratches on her car. M.S. and E.L. filed a police report regarding these incidents.

In February 2016, Wong began “calling [M.S.] names.” Specifically, she called him various iterations of “Pervert, mother fucker, asshole, bald,” and “[f]ucking idiot, asshole, pervert.” During these tirades, Wong would also yell “209,”

in reference to the unit in which M.S. and E.L. resided. Wong would yell these names through the window of her condo. This occurred very often, approximately two to three times a day. At some point, Wong began using an “amplifying device,” to further increase the volume of her yelling. This occurred daily, any time from morning until late at night.³ M.S. called the police to complain about the noise between three and six times.

Wong’s neighbor, L.T., testified that she heard “lots of noise, primarily yelling,” coming from Wong’s condo. In general, Wong would yell “things about a creepy pervert. There was a lot of profanity.” L.T. went to Wong’s condo to complain about the noise and Wong answered the door with an “air pistol” in her hand.

Also in February 2016, M.S. observed “a target that was shot full of holes” in the backseat of Wong’s car with the words “Pervert, 209, bald creep, loser, asshole” written on it. The target was displayed in Wong’s car “constantly.” It made M.S. feel “[e]ven more concerned about our safety, mine and my girlfriend’s.”

On February 11, February 26, and March 8, 2016, Wong made explicit death threats to M.S. and E.L. M.S. became concerned, because “[Wong] would scream at us and

³ E.L. testified that the verbal abuse ceased in the summer of 2016.

say that she's going to blow our fucking heads off."⁴ L.T. heard Wong say, "I'll fucking kill you," in March or April of 2016.

M.S. believed that Wong was capable of carrying out her threat to "blow [his] brains out," because he and E.L. "had heard that she had a gun."

In early 2016, Wong also harassed the couple regarding their dog, who barked when Wong slammed the door to her condominium or yelled out of her window. In January 2016, M.S. and E.L. received a letter from animal control. In March 2016, Wong started knocking on her own door, to intentionally cause the dog to bark. Wong would repeatedly knock on her door and then yell at the dog to shut up. In April 2016, M.S. and E.L. received another letter from animal control, which compelled them to attend a hearing.

On the morning of June 14, 2016, M.S. took his dog out for a walk. When he was coming back into the garage, Wong got into her car, pulled out of her parking space "and attempt[ed] to run [him] over." She had her window down and "she headed right toward [him] and gave [him] the finger." "She swerved toward the left and headed toward [him]." He called the police and reported the incident.

⁴ M.S. testified that Wong may have made threats on as many as two other occasions.

Stalking in Violation of a Court Order (Count 6)

On August 10, 2016, the court granted M.S. a protective order against Wong.⁵

M.S. continued to hear “all this noise and slamming” coming from Wong’s apartment after the protective order was issued. “[Wong] would yell in her apartment ‘pervert, 209,’ along with all the other descriptives [*sic*], bald, asshole. And then she would laugh. It sounded like a cackle. And like she was talking to somebody else and clapping her hands.” Nothing changed after the issuance of the protective order.

On October 21, 2016, Wong appeared in court and was admonished to obey the terms and conditions of the protective order. She was advised that she would be remanded into custody if there were any violations of the order.

M.S. testified that after the preliminary hearing on December 15, 2016, he was still afraid of Wong. He “felt that she was after the two of us, either by harassing us or by driving her car toward us.” He also remained fearful because of “[Wong’s] language and yelling and she actually saying [*sic*] that she was going to shoot our fucking brains out”

In December 2016, M.S. made three separate recordings of Wong screaming at him from her condo. On

⁵ Sometime in August 2016, M.S. learned that Wong had given her gun to her attorney.

one such occasion, Wong yelled, “Your fucking dog, you bald ugly piece of shit, pervert. Shut it up. [¶] What the fuck is wrong with you?”

On December 29, 2016, an information was filed charging Wong with vandalism, assault with deadly weapon, criminal threats, elder abuse, and stalking.

On January 9, 2017, additional charges of stalking and violating a protective order were filed in a separate case with a new case number. The charges were consolidated on June 2, 2017.

Wong’s harassing behavior continued until she moved out of her condominium in April 2017. On February 11, 2017, the words “loser, asshole, pervert, 209” were “scribbled” on the front of M.S. and E.L.’s mailbox. The couple informed the police about the vandalism. M.S. testified that the target with bullet holes was in Wong’s car until about March 2017. Wong also continued to harass M.S. and E.L.’s dog. L.T. testified that she heard Wong say, “I’ll fucking kill you,” as late as “maybe even early 2017.”⁶

DISCUSSION

Sufficiency of the Evidence

Wong argues that there was insufficient evidence to support the second stalking conviction, which pertained to

⁶ L.T. did not specify as to who, if anyone, Wong was speaking to when she made this threat.

the time-period of September 26, 2016, through April 24, 2017. She acknowledges that the harassment continued, but contends there was no statement or conduct that could be considered an express or implied threat made during this time. We disagree, and conclude that the evidence at trial demonstrated Wong continued to engage in a course of conduct intended as a credible threat against M.S. after the protective order was imposed.

Legal Principles

In assessing the sufficiency of the evidence on appeal, “we review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] “[I]f the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness’s credibility for that of the fact finder.” [Citation.] “The standard of review is the same in cases in which the People rely mainly on circumstantial evidence. [Citation.] ‘Although it is the duty of the [finder of fact] to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the [finder of fact], not the appellate court which must be convinced of the

defendant's guilt beyond a reasonable doubt.”” (*People v. Snow* (2003) 30 Cal.4th 43, 66.)” (*People v. Uecker* (2009) 172 Cal.App.4th 583, 593–594 (*Uecker*).)

“Any person who . . . willfully and maliciously harasses another person and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family is guilty of the crime of stalking” (§ 646.9, subd. (a).) Further, Penal Code section 646.9, subdivision (b) imposes additional sentencing upon “[a]ny person who violates subdivision (a) when there is a temporary restraining order, . . . or any other court order in effect prohibiting the behavior described in subdivision (a) against the same party”

“Section 646.9 does not require that the defendant actually intend to carry out the threat. It is enough that the threat causes the victim reasonably to fear for her safety or the safety of her family, and that the accused makes the threat with the intent to cause the victim to feel that fear. [Citation.] In addition, in determining whether a threat occurred, the entire factual context, including the surrounding events and the reaction of the listeners, must be considered.” *People v. Falck* (1997) 52 Cal.App.4th 287, 297–298.

“The ‘credible threat’ element is statutorily defined as a threat ‘made with the apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety’ (§ 646.9, subd. (g).)” (*People v. Zavala* (2005) 130 Cal.App.4th 758,

767.) Further, a credible threat “includes a threat implied by a pattern of conduct or a combination of verbal and written communicated statements and conduct.” (*Uecker, supra*, 172 Cal.App.4th at p. 594.)

“The clear and unambiguous language of section 646.9 defines stalking as a continuous course of conduct crime.” (*People v. Chilelli* (2014) 225 Cal.App.4th 581, 586.)

Analysis

Here, the evidence at trial sufficiently established that Wong was engaged in a deliberate pattern of continuous conduct that amounted to an implied threat against M.S., and that Wong’s conduct persisted during the relevant time-period (i.e., September 26, 2016, through April 24, 2017). Specifically, the evidence at trial clearly demonstrated that Wong continued to yell accusations against M.S. Also, the signs on Wong’s patio and the target in her car remained displayed until she moved in March 2017. Wong also defaced M.S. and E.L.’s mailbox during this time. By M.S.’s own account, he was still afraid of Wong after the protective order was issued. He “felt that she was after the two of us, either by harassing us or by driving her car toward us.” He also remained fearful because of “[Wong’s] language and yelling and she actually saying [*sic*] that she was going to shoot our fucking brains out”

In addition, Wong does not challenge the sufficiency of the evidence underlying her conviction in count 7, for

violating the protective order. The jury's finding necessarily implies that Wong was engaged in harassing conduct likely to constitute an implied threat against M.S.⁷

Evaluating the entire factual scenario in this matter, including the surrounding circumstances and M.S.'s reaction to Wong's behavior, a reasonable trier of fact could find the Wong guilty beyond a reasonable doubt.

Pretrial Diversion for Mental Health Disorders

Wong contends that her conviction must be conditionally reversed because she is entitled to a hearing under recently enacted section 1001.36, which allows qualifying defendants to participate in pretrial diversion and receive mental health treatment in lieu of prosecution. (§ 1001.36, subd. (c).) Relying on *People v. Frahs* (2018) 27 Cal.App.5th 784 (*Frahs*), review granted Dec. 27, 2018, S252220,⁸ Wong argues that the Legislature intended for the

⁷ That E.L.'s testimony appears to undercut M.S. at times is irrelevant, since on appeal we review the record in the light most favorable to the judgment. Moreover, E.L. was not a named victim of Wong's stalking. Rather, the stalking charge lists M.S. as the sole victim.

⁸ See California Rules of Court, rule 8.1115(e)(1) ["[p]ending review and filing of the Supreme Court's opinion, unless otherwise ordered by the Supreme Court . . . , a published opinion of a Court of Appeal in the matter has no

statute, which provides ameliorating benefits to defendants, to apply retroactively in cases like hers, in which the judgment was not final at the time the statute was enacted. The Attorney General counters that the language of section 1001.36, subdivision (c), demonstrates that the Legislature intended the enactment to operate prospectively, i.e., the enactment would not apply to cases such as this one in which there has already been an adjudication.

Our Supreme Court has granted review to decide whether section 1001.36 applies retroactively. (*Frahs*, *supra*, 27 Cal.App.5th 784 [holding that section 1001.36 applies retroactively].) Because our Supreme Court will soon have the final word, we will keep our discussion brief.

We agree with the outcome in *Frahs*, which held that section 1001.36 applies retroactively to defendants whose cases are not yet final. Wong’s case is not yet final, and the record affirmatively discloses that she meets at least one of section 1001.36’s threshold eligibility requirements—Wong “suffers from a mental disorder as identified in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders, . . .” (§ 1001.36, subd. (b)(1)(A)). A court-appointed mental health professional evaluated Wong’s competence to stand trial and concluded that she suffers from “Bipolar Disorder.”

Moreover, the record indicates that Wong may meet other requirements under section 1001.36—the facts suggest

binding or precedential effect, and may be cited for potentially persuasive value only”].

Wong’s mental disorder may have been “a significant factor in the commission of the charged offense,” (§ 1001.36, subd. (b)(1)(B)), and that Wong may be amenable to treatment for her mental illness (§ 1001.36, subd. (b)(1)(E)). At sentencing, the Court observed that Wong “definitely ha[s] something that’s weighing on [her], a mental disorder, which causes [her] to confuse reality.” Further, as a condition of her probation, Wong was ordered to “see a psychiatrist and take prescribed medication,” and to “engage in psychological counseling.” We therefore remand to allow the trial court to determine whether Wong should benefit from diversion under section 1001.36. (*Frahs, supra*, 27 Cal.App.5th at p. 791.)

DISPOSITION

The judgment is conditionally reversed and the cause is remanded for the trial court to consider whether to exercise its discretion to grant pretrial diversion under section 1001.36, including whether to conduct a hearing to determine Wong's eligibility. If the court grants Wong pretrial mental health diversion, and Wong successfully completes diversion, the court shall dismiss the charges in accordance with section 1001.36, subdivision (e). If either of these conditions is not met, the trial court shall reinstate the judgment.

MOOR, J.

We concur:

RUBIN, P. J.

KIM, J.